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In The

Supreme Court of the United States

THE UNITED STATES OF AMERICA,

Petitioner,

versus

JUAN RESENDIZ-PONCE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* PAUL HARDY IN SUPPORT OF RESPONDENT JUAN RESENDIZ-PONCE

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QUESTION PRESENTED FOR REVIEW[1]

I.

Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error?

[1] The names of all parties to this proceeding appear in the caption. See Rule 14.1(b) of the Supreme Court Rules.

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INTEREST OF *AMICUS CURIAE*

Paul Hardy respectfully submits this brief in accordance with Supreme Court Rule 37.3.[2] Hardy is a defendant facing a federal capital resentencing hearing, following an appeal in which his death sentence, but not his conviction, was overturned. *See United States v. Causey*, 185 F.3d 407 (5th Cir. 1999). The indictment on which the Government seeks to execute Hardy indisputably lacks the statutory aggravators and mental state element required for the imposition of the death penalty under federal law. Nevertheless, the Court of Appeals for the Fifth Circuit has ruled that the Government may go forward with capital proceedings. *See United States v. Davis*, 380 F.3d 821 (5th Cir. 2004). In the view of the Fifth Circuit, the error in Hardy's case has already occurred, even though his resentencing has not, and this error can be evaluated using a harmless error [*Chapman*] analysis.

According to the Fifth Circuit, when the *Chapman* analysis is conducted in Hardy's case, the error is revealed as harmless, because "any rational grand jury" would have indicted him for a capital offense, had it been asked to do so. Following the grant of *certiorari* in the instant proceeding, Hardy's resentencing was stayed by the district court, because it viewed this proceeding [*Resendiz-Ponce*] as

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[2] The parties consented to the filing of this brief, and copies of the written consent of the parties have been filed with the Clerk of Court. The brief was not authored in any part by counsel for either party. No person or entity other than *amicus curiae* has made a monetary contribution towards the preparation or submission of this brief. However, counsel for *amicus curiae* will seek compensation for their time, and reimbursement for their expenses from the United States, pursuant to the Criminal Justice Act (18 U.S.C. § 3006A).

potentially dispositive of the issues in Hardy's case. Counsel for Hardy concur, hence this brief as *amicus*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .

The Sixth Amendment to the United States Constitution, provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . .

STATEMENT OF THE CASE

Amicus Paul Hardy adopts the statement of the case of the Petitioner, the United States.

SUMMARY OF THE ARGUMENT OF *AMICUS* PAUL HARDY

In calling for the application of the harmless error rule to the omission of an element of the offense sought to be charged from a grand jury indictment, the United States ignores the constitutional role and function of a grand jury. Although grand juries are subject to certain

judicial constraints, grand juries cannot be viewed as performing a judicial function. Rather, they stand *between* the executive branch and criminal proceedings in the federal courts, and actually perform what is tantamount to an executive branch function: deciding who will be charged, when they will be charged, and what they will be charged with. Put most bluntly, the United States misses the point completely when it argues for the blanket application of a standard of *judicial* review to that function of the grand jury that is best understood as an *executive* branch *decision-making* process.

Accordingly, the omission of an element of an offense from an indictment is **not** analogous to the omission of an element of an offense in instructions to a petit jury. The omission of an element from an indictment means the executive branch has either erred, or, as in *amicus* Hardy's case, made a deliberate choice regarding the indictment presented to the grand jury for its decision. Normally, such executive branch decisions are not subject to judicial review for "harmlessness."

On the other hand, when an element of an offense is inadvertently omitted from jury instructions, it means there has been *judicial* error, in *judicial* proceedings, and review by higher courts is proper, under the appropriate standard of judicial review.

Although this Court's decisions do not preserve this constitutional distinction perfectly, by and large it is honored. A careful review of this Court's opinions, beginning with *United States v. Mechanik*, 475 U.S. 66 (1986) and ending with *United States v. Cotton*, 535 U.S. 625 (2002) demonstrates an ever-present implicit, and occasionally explicit awareness of the constitutional allocation

of roles assigned to grand juries on one hand, and petit juries, on the other. Moreover, the decisions of this Court in *Apprendi*, *Jones*, and *Ring* militate strongly against the arguments of the United States.

Finally, if – as requested by the United States, this Court adopts a harmless error standard of review for the omission of the elements of an offense from an indictment – the Court will have completely insulated the Government from all consequences of erroneous decisions or misguided choices regarding indictments in federal proceedings. If a trial is conducted on a flawed indictment, over the defendant's objection, and the defendant is acquitted, the impact of the Government's error is never known. On the other hand, if the defendant is convicted, then the Government is *always* in a position to argue that the error was harmless, else the properly instructed petit jury (taken from the same venire as the grand jury) would not have convicted.

Worse, using a harmless error standard to review legally inadequate indictments permits courts, like the Fifth Circuit in *amicus* Hardy's case, or like the district court in Respondent Resendiz-Ponce's case, to go *forward* on flawed indictments, knowing that the error that is about to be committed will be absolved by the doctrine of harmless error. Accordingly, *amicus* Hardy urges this Court to affirm the decision of the Ninth Circuit, and find that the omission of an element of an offense from a federal indictment is presumptively prejudicial, and not subject to harmless error analysis, when the omission is objected to before trial.

ARGUMENT

1. The essential function of grand juries

Fortunately, this proceeding does not require counsel for *amicus* to summarize, much less reconcile the numerous, and sometimes conflicting views of the history of the grand jury – because that would be a task well beyond their ability. It is sufficient for the purposes of this brief to note that most, if not all histories of the grand jury are consistent on one point: since the publication of the Assize of Clarendon in 1166, the essential *function* of grand juries has been to investigate crimes, and to indict those suspected of committing them. *See* T. Plunkett, A CONCISE HISTORY OF THE COMMON LAW 112-13 (5th ed. 1956); 1 F. Pollock & F. Maitland, THE HISTORY OF ENGLISH LAW 151-53 (2d ed. 1898); Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHI. L. REV. 613, 613 (1983), and R. Younger, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES 1634-1941, at 5-6 (1963).

And thus, while placing that power and function in the hands of the people provides a shield for the citizenry from arbitrary government conduct, the existence of that shield does not change the nature of the essential task of the grand jury, which is, to continue the metaphor, to act as a sword. *See, e.g.*, *United States v. Calandra*, 414 U.S. 338, 343 (1974) (The grand jury's "responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.")

Put differently, it is the *placement* of the grand jury in the hands of the people that gives it its protective powers,

but the essence of those powers is unchanged: they are executive in nature, not judicial. Once that is understood, an analysis of whether the grand jury was acting as a sword or a shield at any given point in American history after the ratification of the Fifth Amendment serves no meaningful judicial purpose.

2. Judicial review of grand jury issues

What is meaningful, from a judicial perspective, is an examination of this Court's opinions addressing problems occurring before grand juries, or raised by grand jury proceedings. Viewed most broadly, those decisions fall into two categories: those addressing questions raised by the *administration* of a grand jury; and those which deal with errors affecting the core function of the grand jury: the exercise of its executive branch powers. As shown below, the former cases apply some form of harmless error analysis, the latter, a rule in which prejudice is presumed, if the error was preserved before trial, because the "structural protections" provided by the grand jury have been compromised.

In *United States v. Mechanik*, 475 U.S. 66 (1986), the Court determined that a violation of Federal Rule of Criminal Procedure 6(d) – one which had no demonstrable effect on the indictment returned by the grand jury – could be treated as harmless. Significantly, the Court

> . . . assume[d] for the sake of argument that the simultaneous presence and testimony of the two Government witnesses before the grand jury violated Rule 6(d), **and that the District Court would have been justified in dismissing portions of the indictment on that basis had there been actual prejudice and had the**

> **matter been called to its attention before the commencement of the trial.** (emphasis added)

Id. at pp. 70-71.

This distinction between matters that pertain to the structural protections of a grand jury, and those that do not was further developed in *Bank of Nova Scotia v. The United States*, 487 U.S. 250 (1988). In that opinion, this Court rejected an effort to divide error relating to grand jury proceedings into the categories of "harmless" versus "fundamental," but instead specifically looked to whether the error reached to such "structural protections" of the grand jury, *i.e.*, to those aspects of the grand jury relating to the constitutional constraints on its power:

> We think, however, that an alternative and more clear explanation is that these cases are ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice. See *Rose v. Clark*, 478 U.S. 570, 577-578 (1986). These cases are exemplified by *Vasquez v. Hillery*, 474 U.S. 254, 260-264 (1986), where we held that racial discrimination in selection of grand jurors compelled dismissal of the indictment. In addition to involving an error of constitutional magnitude, other remedies were impractical and it could be presumed that a discriminatorily selected grand jury would treat defendants unfairly. See *United States v. Mechanik*, supra, at 70-71, n. 1. We reached a like conclusion in *Ballard v. United States*, 329 U.S. 187 (1946), where women had been excluded from the grand jury. The nature of the violation allowed a presumption that the defendant was prejudiced, and **any inquiry into**

> **harmless error would have required unguided speculation.**

Bank of Nova Scotia v. The United States, 487 U.S. 250, at 256-257. (emphasis added)

It is hard to imagine speculation more "unguided" than speculation about how a "reasonable grand juror" might have voted, when the speculation is based on evidence the grand juror may never have heard; indeed, which may not have existed at the time the case was presented to the grand jury.

In this same line of cases is *United States v. Cotton*, 535 U.S. 625 (2002), and contrary to the Government's suggestion, that opinion does not compel the result the Government seeks here. Seen in its most basic terms, *Cotton* stands for the proposition that the omission of an element of an offense from an indictment, not objected to until *after* trial, is not an error that affects the fairness, integrity, or reputation of *judicial* proceedings. This does not mean that the error is not fundamental, or that it should not result in a dismissal of the indictment, if objected to **prior to trial**.

3. Errors in grand jury indictments, and the other caselaw of this Court

Treating the omission of elements from indictments as presumptively prejudicial, if the omission is objected to prior to trial, is not only consistent with this Court's caselaw regarding grand juries, it is the only rule that can be squared with both *Chapman v. California*, 386 U.S. 18 (1967), and this Court's decisions in *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002).

A. Grand juries and *Chapman*

It cannot be emphasized too strongly that *Chapman* creates a standard for reviewing *trial* errors, and that the standard passes constitutional muster, and works, only because a reviewing court can look at both the error complained of, and the *proceedings in which the error occurred*, to determine the impact of the former on the latter.

When elements of an offense are missing from an indictment, the same kind of review is impossible to conduct, because the error can never be examined in light of the proceedings in which the error occurred, given the rule of grand jury secrecy. Thus, it can never be known if the omission of the element was deliberate, accidental, or the result of some other factor. Moreover, looking at trial evidence for a *post-hoc* determination of what a rational grand jury would have done is, in one sense, to ignore the reality that in many instances, the impact of the error can never actually be known. As this Court said in *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (emphasis added):

> Nor are we persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions. The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense – all on the basis of the same facts. Moreover, "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." *United States v. Ciambrone*, 601 F.2d

616, 629 (CA2 1979) (Friendly, J., dissenting). **Thus, even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come.**

B. Grand juries and *Jones*, *Apprendi*, and *Ring*

The other principle to be honored is the one established by *Jones*, *Apprendi*, and *Ring*. Simply put those cases establish that there must be congruence between and among the offense charged by the grand jury, the verdict rendered by the petit jury, and the sentence imposed by the court. As this Court wrote in *Blakely v. Washington*, 542 U.S. 296 (2004):

> This case [*Blakely*] requires us to apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L.Ed. 2d 435, 120 S.Ct. 2348 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the

> common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p. 55 (2nd ed. 1872).[footnote omitted] These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; we compiled the relevant authorities in *Apprendi, see 530 U.S., at 476-483, 489-490* (THOMAS, J., concurring), and need not repeat them here. [footnote omitted].
>
> * * *

It is one thing to make a verdict congruent to an indictment; or a sentence congruent to a verdict. It is quite another to make the flawed indictment itself, a charge which "lacks any particular fact which the law makes essential to the punishment . . . [one which is] no accusation within the requirements of the common law, and it is no accusation in reason," congruent to a subsequent verdict, one reached through different proceedings, held at a different time, in front of a different body with different constitutional obligations, who heard different evidence.

4. The ramifications of the adoption of a harmless error standard.

As a practical matter, there are very few federal prosecutions that would be affected every year by a rule that treated the omission of the element of an offense as presumptively prejudicial, if objected to before trial. Moreover, in most instances the error could easily be cured, by obtaining a superseding indictment – either because the court dismissed the original one, or because a prosecutor thought it a prudent thing to do. And if the flawed indictment were not objected to prior to trial, then the rule established by *Cotton* would apply: the burden

would be on the defendant to demonstrate that this error seriously affected the fairness, integrity, or reputation of judicial proceedings.

To take any other position is to read the indictment clause out of the Fifth Amendment. If it is acceptable to be missing one element, why not two, or three? The result would be the same – a conviction proves that a rational grand jury would have charged the missing elements.

But the history of the grand jury belies this approach: if a crime has not been charged, then a crime has not been charged, and no amount of *post-hoc* rationalizing can change that fact. The opinion of the Ninth Circuit should be affirmed.

CONCLUSION

Wherefore, this Court is respectfully urged to affirm the opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted, this 10th day of August, 2006.

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